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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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EX PARTE	§	
	§	
	§	**NO. PD-0034-20**
	§	
SULIA LAWRENCE BROWN	§	

PETITION FOR DISCRETIONARY REVIEW FROM THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS' PUBLISHED OPINION IN CASE NUMBER 02-19-00064-CR, IN THE APPEAL FROM CAUSE NUMBER 1503867, IN THE CRIMINAL DISTRICT COURT NO. 1 OF TARRANT COUNTY, TEXAS; THE HONORABLE ELIZABETH BEACH, PRESIDING.

STATE'S PETITION FOR DISCRETIONARY REVIEW

SHAREN WILSON
Criminal District Attorney
Tarrant County, Texas

JOSEPH W. SPENCE
Asst. Criminal District Attorney
Chief, Post-Conviction

RILEY SHAW &
ASHLEA B. DEENER
Asst. Criminal District Attorneys

ANDRÉA JACOBS
Asst. Criminal District Attorney
State Bar No. 24037596
401 W. Belknap Street
Fort Worth Texas 76196-0201
(817) 884-1687
FAX (817) 884-1672
CCAAppellateAlerts@tarrantcountytx.gov

IDENTITY OF JUDGE(S), PARTIES, AND COUNSEL

- The parties to the trial court's judgment are the State of Texas and Appellant, Mr. Sulia Lawrence Brown.

- The trial judges were the Honorable Elizabeth Beach (elected judge of the Criminal District Court No. 1, Tarrant County, Texas) and the Honorable Nelda Cacciotti, magistrate.

- Counsel for the State at trial were Tarrant County Assistant Criminal District Attorneys Riley Shaw, Ashlea B. Deener, and Andréa Jacobs, 401 W. Belknap Street, Fort Worth, Texas 76196-0201.

- Counsel for the State on appeal in the court of appeals and before this Court is Tarrant County Assistant Criminal District Attorney Andréa Jacobs, 401 W. Belknap Street, Fort Worth, Texas 76196-0201.

- Counsel for Appellant at trial was Taylor Ferguson, 300 Burnett St., Ste. 124, Fort Worth, Texas 76102.

- Counsel for Appellant on appeal in the court of appeals and before this Court is Wes Ball, 4025 Woodland Park Blvd, Ste. 370, Arlington, Texas 76013.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUTES, RULES, AND ORDINANCES

MISCELLANEOUS

STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument. Oral argument is necessary because what "maximum term provided by law for the offense" means for determinate-sentence eligible offenses has not been authoritatively decided and this Court's decisional process would be significantly aided by oral argument. TEX. R. APP. P. 39.1(b), (d).

STATEMENT OF THE CASE

On May 23, 2012, the State filed a petition alleging that Appellant, a twelve-year-old child, engaged in delinquent conduct, to-wit: aggravated sexual assault of a child younger than 14 years of age. [CR 21] On June 8, 2012, the juvenile court found that Appellant was unfit to proceed, stayed the juvenile proceedings, and committed Appellant. [CR 46, 49] Appellant has been committed to the custody of a residential care facility at Mexia ever since. [CR 11-13]

On July 5, 2017, Appellant's case was transferred to the district court pursuant to section 55.44 of the Texas Family Code. [CR 7] On December 11, 2017, the district court found Appellant incompetent to stand trial and ordered his commitment continued. [CR 11-13]

On June 23, 2018, Appellant filed a pretrial application for writ of habeas corpus[1] alleging that his continued commitment in the mental health facility was improper. [CR 15] On January 30, 2019, the trial court denied Appellant's application. [CR 68, 77] Appellant appealed this decision. [CR 79]

In its October 17, 2019, Memorandum Opinion, the Second Court of Appeals reversed the trial court's order denying Appellant's pre-trial habeas application. The court held that Appellant could not be confined past his nineteenth birthday. *Ex parte Brown*, --- S.W.3d ----, 2019 WL 5251133, at *7 (Tex. App. – Fort Worth Oct. 17, 2019, no pet. h.) (attached hereto as Appendix A). Specifically, the panel held:

> On this record, we hold that 'the maximum term provided by law for the offense for which [Appellant] was to be tried,' assuming the juvenile court had adjudicated [Appellant] delinquent while he was still a child, was until his 19th birthday.

Id.

[1] The application was filed under Article 5, § 8 of the Texas Constitution. [CR 15]

STATEMENT OF PROCEDURAL HISTORY

On October 17, 2019, the Second Court of Appeals issued its decision written by Justice Kerr and joined by Justices Birdwell and Bassell. *See Ex parte Brown*, 2019 WL 5251133, at *7. The panel held that Appellant could not be confined past his nineteenth birthday because the State did not obtain grand-jury approval for a determinate sentence. *Id.*

On November 18, 2019, the State filed its motions for en banc consideration and rehearing.

On December 12, 2019, the Second Court of Appeals denied the State's motions for en banc reconsideration and rehearing.

On January 10, 2020, this Court granted the State's motion for extension to file this petition for discretionary review.

GROUNDS FOR REVIEW

1. Article 46B.0095 of the Texas Code of Criminal Procedure allows for commitment of an incompetent defendant for the "maximum term provided by law for the offense for which the defendant was to be tried." The maximum term of confinement for a juvenile adjudicated for a first-degree felony offense is forty years if the State obtains grand-jury approval for a determinate sentence. What, then, is "the maximum term provided by law" for determining the length of mental-health commitment for a juvenile who is accused of a crime severe enough to be determinate-sentence eligible but is found unfit to proceed before a grand jury could make a determinate-sentence finding? [CR 11, 32-33, 46, 49]

2. Should the Second Court of Appeals have considered the State's defense that it was prohibited from pursuing a determinate-sentence finding from the grand jury because the juvenile was unfit to proceed and the judicial proceedings were stayed as a matter of law? [CR 49]

REASONS FOR REVIEW

There are numerous reasons why this Court should grant discretionary review, including:

(1) The Second Court of Appeals has decided an important question of state law that has not been, but should be, settled by the Court of Criminal Appeals. *See* TEX. R. APP. P. 66.3(b). That is:

(a) What is the "maximum term as provided by law" for a determinate-sentence eligible offense when no determinate-sentence finding has been made?

(b) Whether the "maximum period of confinement the defendant could have received" under section 55.44 of the Texas Family Code and the "maximum term provided by law for the offense" under article 46B.0095(a) are the same.

(2) The Second Court of Appeals' refusal to consider the State's defense that it was prohibited from pursuing a determinate-sentence finding from the grand jury because the juvenile proceedings had been stayed so far departed from the accepted and usual course of judicial proceedings that it calls for this Court to exercise its power of supervision. *See* TEX. R. APP. P. 66.3(f).

ARGUMENT

I. The Second Court of Appeals erred in holding that the "maximum term provided by law" under article 46B.0095 of the Texas Code of Criminal Procedure does not include the determinate-sentence range when the offense is determinate-sentence eligible but the juvenile was found unfit to proceed before a grand jury could make a determinate-sentence finding.

Section 55.44 of the Texas Family Code provides that juveniles unfit to proceed who have committed determinate-sentence *eligible* offenses shall be transferred to the district court on their eighteenth birthday. *See* TEX. FAM. CODE §§ 53.045, 55.44(a)(2). And article 46B.0095 of the Texas Code of Criminal Procedure provides that a defendant may not be committed "to a mental hospital or other inpatient or residential facility . . . for a cumulative period that *exceeds the maximum term provided by law for the offense for which the defendant was to be tried*." *See* TEX. CODE CRIM. PROC. art. 46B.0095(a) (emphasis added). Here, the "maximum term provided by law" for the offense committed by Appellant is forty years. Seemingly dissatisfied with the plain language of article 46B.0095(a), the Second Court of Appeals held that forty years cannot be considered the maximum term because the State did not obtain a determinate-sentence *finding* from the grand jury.

Ex parte Brown, 2019 WL 5251133, at *7. Notably, the plain language of article 46B.0095(a) contains no such requirement. The Legislature could have required the State to obtain grand-jury approval before transferring the juvenile-turned-adult to the trial court, but it did not. *See* TEX. FAM. CODE §§ 55.44(a)(2), 53.045.[2]

In support of its decision, the Second Court of Appeals states that, because the "40-year sentence was only a potential punishment," it was not the "maximum term provided by law." *Id.*[3] However, the *potential* punishment for the *offense* should be the "maximum term provided by law" for that *offense*. To hold otherwise would be contrary to Legislative intend and lead to absurd results.

When construing a statute, the Court is to give effect to the collective intent of the legislature in enacting the statute. *May v. State*, 919 S.W.2d 422, 423 (Tex. Crim. App. 1996). This Court may "resort to examination of extratextual factors to

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2 "In a 'statutory construction' sense, omissions such as this are presumed to be intentional." *Matter of Ament*, 890 S.W.2d 39, 41 (Tex. 1994) (quotation in original).

3 Appellant was charged with aggravated sexual assault of a child under fourteen years of age. [1 CR 21] Aggravated sexual assault of a child under fourteen is a first-degree felony and determinate-sentence eligible. TEX. PENAL CODE § 22.021 (first-degree felony); TEX. FAM. CODE § 53.045(a)(6) (determinate-sentence eligible). Therefore, the "maximum term provided by law" for this offense is forty years. *See* TEX. FAM. CODE § 54.04(d)(3)(A)(ii) (no more than forty years for a first-degree felony).

discern legislative intent only if the statute is ambiguous or literal interpretation would lead to absurd results which the legislature could not possibly have intended." *Id.* (citing *Boykin v. State*, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991)). These factors include:

> (1) the object sought to be attained, (2) circumstances under which the statute was enacted, (3) any legislative history, (4) common law or former statutory provisions, including laws on the same or similar subjects, (5) the consequences of a particular construction, (6) administrative construction of the statute, and (7) the title (caption), preamble, and emergency provision.

Jordan v. State, 36 S.W.3d 871, 873 (Tex. Crim. App. 2001). Article 46B.0095 of the Texas Code of Criminal Procedure was enacted in 2007. *See* Acts 2007, 80th Leg., R.S., ch. 1307 (S.B. 867), Sec. 2, eff. September 1, 2007. And, according to the House Research Organization Bill Analysis, dated May 16, 2007:

> SB 867 would establish Art. 46B.0095 to create a maximum period of state facility commitment or participation in an outpatient treatment program that was determined by the maximum term *possible for the offense* for which the person was originally arrested.

House Research Organization, Bill Analysis of SB 867 at 3, 80th Leg., R.S. (May 16, 2007) (emphasis added). It appears, then, the Legislature intended that the maximum term of commitment be determined by the possible, or potential,

maximum punishment for the offense. *Id.* The Second Court of Appeals correctly recognized that the potential punishment for this offense is forty years. *Ex parte Brown*, 2019 WL 5251133, at *7. However, it erred in concluding that forty years was not the maximum term as provided by law for the offense for purposes of article 46B.0095.

This situation is distinguishable from the enhanced punishment discussed in *Ex parte Reinke*. This Court held in *Ex parte Reinke*,

> . . . *[U]nless the legislature explicitly states* that an enhancement increases not only the punishment range but also the *level of the charged offense,* the level of the offense alleged in the indictment is not altered by the allegation of prior offenses as enhancements.

Ex parte Reinke, 370 S.W.3d 387, 389 (Tex. Crim. App. 2012) (emphasis added). And, in juvenile proceedings, a determinate-sentence finding is a jurisdictional element of the charged offense. *See* TEX. FAM. CODE § 54.04(d)(3); *Matter of S.D.W.*, 811 S.W.2d 739, 744 (Tex. App. – Houston [1st Dist.] 1991, no writ) ("Without certification of grand jury approval, and the entry of such certification into the record of the case, the trial court was without jurisdiction to impose a determinate sentence"). That is, a determinate sentence gives the Texas Department

of Criminal Justice, and the felony court, jurisdiction over the juvenile after he is adjudicated guilty in juvenile court but "ages out" of the juvenile system. *See* TEX. FAM. CODE § 54.04(d)(3).

In addition, jurisdictional elements are considered when determining the "maximum term" of commitment. *See, e.g.*, *Ex parte Reinke*, 370 S.W.3d at 389 ("for offenses such as felony theft (3d) and felony DWI, the prior offenses that must be alleged are not 'enhancements,' but jurisdictional elements of the offense itself"). Appellant's first-degree felony is a determinate-sentence eligible offense by law. *See* [1 CR 21]; TEX. PENAL CODE § 22.021 (first-degree felony); TEX. FAM. CODE § 53.045(a)(6) (determinate-sentence eligible). Therefore, this Court should grant this petition to distinguish *Ex parte Reinke*.

The Second Court of Appeals also determined that some juveniles will be transferred to district court only to be released less than one year later. *Ex parte Brown*, 2019 WL 5251133, at *7. That is, article 55.44 requires that a juvenile be transferred to the district court upon his eighteenth birthday. *See* TEX. FAM. CODE § 55.44(a). The district court then must "institute proceedings under Chapter 46B, Code of Criminal Procedure" before the 91st day after transfer. *See* TEX. FAM. CODE

§ 55.44(b). These additional proceedings may include a jury trial, expert evaluation, and additional testing. *See* TEX. CODE CRIM. PROC. arts. 46B.005, 46B.021, 46B.024, 46B.051. It is absurd to have the juvenile transferred at age eighteen and then tested, evaluated, and put through a jury trial on competency, only to have him released at nineteen. This could not have been what the Legislature intended since the juvenile court would not automatically lose jurisdiction over the proceeding when the juvenile turned eighteen if he had not been transferred as required by law under article 55.44 of the Texas Family Code. *See* TEX. FAM. CODE § 51.0412 (jurisdiction over incomplete proceedings).

Finally, it should be noted that the Second Court of Appeals, in reversing the trial court, considered the maximum punishment Appellant could receive if he were ever found competent. *Ex parte Brown*, 2019 WL 5251133, at *7. However, article 46B.0095 relates to the "maximum term provided by law for the *offense*" if never found competent while section 55.44 of the Texas Family Code relates to the "maximum period of confinement the *defendant* could have received" if ever found competent. *Compare* TEX. CODE CRIM. PROC. art. 46B.0095(a), *with* TEX. FAM. CODE § 55.44(b) (emphasis added). Therefore, the applicable statute, article

46B.0095, is specific to the offense, a first-degree-felony offense of aggravated sexual assault of a child under fourteen years of age, which is determinate-sentence eligible. As such, the "maximum term provided by law for the offense" in this case is forty years.

This Court should grant this petition to resolve how article 46B.0095 defines the "maximum term provided by law" for determinate-sentence eligible offenses.

II. The Second Court of Appeals erred by not considering the State's defense that it was prohibited from pursuing a determinate-sentence finding from the grand jury because the juvenile proceedings were stayed soon after the initial petition was filed.

The State maintains that obtaining determinate-sentence approval from the grand jury is irrelevant to determining the "maximum term" for the offense. The Second Court of Appeals disagreed. If obtaining grand-jury approval for a determinate sentence is relevant to the inquiry, as the Second Court of Appeals held, then the Second Court of Appeals should have considered the State's defense that it could not obtain grand-jury approval due to the juvenile court's stay. Instead, the Second Court of Appeals stated,

> The parties dispute the stay's scope and whether the State could have

> worked around the stay with the juvenile court's permission, *but we do not resolve those issues*. Whatever the reason, the State did not obtain grand-jury approval.

Ex parte Brown, 2019 WL 5251133, at *3 n. 6 (emphasis added). The Second Court of Appeals, therefore, failed to resolve a central issue to this appeal.

If a juvenile is found unfit to proceed, the juvenile court shall "stay the juvenile court proceedings for as long as the incapacity endures." TEX. FAM. CODE § 55.32(f)(1). The only exception to the stay is "any legal objection to the juvenile court proceedings." TEX. FAM. CODE § 55.32(g). But, any determinate-sentence approval obtained by the State requires certification to the juvenile court and "[entry] in the record of the case." TEX. FAM. CODE § 53.045(d). Thus, the stay required by the statute prevented the State from pursuing a determinate sentence while the case was pending in juvenile court as the referral, and any filing of the grand-jury approval, would have been void as a matter of law. *See, e.g., In re Helena Chem. Co.*, 286 S.W.3d 492, 498 (Tex. App. – Corpus Christi 2009, no pet.) ("Parties to the suit at the time the stay is imposed are notified of the stay; any action subsequently made by such parties in the trial court are rightfully considered violations of the stay

and are void as a matter of law.").[4]

There has been some debate about whether obtaining grand-jury approval is a "unilateral" proceeding, much like obtaining an indictment from the grand jury in the adult court.[5] The argument goes, then, that such an action does not violate the stay because a filing does not involve the trial court; however, the party's filings in the trial court are also considered void as a matter of law. *See In re Helena Chem. Co.*, 286 S.W.3d at 498. And, as explained above, the grand-jury approval must still be filed and certified with the trial court. TEX. FAM. CODE § 53.045(d). The question remains then, whether the filing of grand-jury approval is considered a filing of a party, the State, or of a separate party, who is not bound by the stay. According to section 53.045 of the Texas Family Code, the following procedures occur when the State seeks a determinate-sentence approval:

- the State refers the previously-filed petition to the grand jury,

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4 Generally, unless "when in conflict with a provision of [Title 3 of the Texas Family Code], the Texas Rules of Civil Procedure govern proceedings under [Title 3]." TEX. FAM. CODE §51.17(a); *see Matter of M.R.*, 858 S.W.2d 365 (Tex. 1993).

5 A stay is also put into place as to "all other proceedings" in adult court cases "[i]f the court determines there is evidence to support a finding of incompetency." TEX. CODE CRIM. PROC. art. 46B.004(d).

- the grand jury may investigate the underlying facts and circumstances of the petition,
- the grand jury approves/disapproves of the petition, and
- if approved, "the fact of approval shall be certified to the juvenile court, and the certification shall be entered in the record of the case."

See TEX. FAM. CODE § 53.045(a)-(d). It would appear, then, that the State files the grand-jury approval with the juvenile court. *Id.* And, while not an amended petition, the notice of grand-jury approval works much like a supplement to the State's petition as it exposes the juvenile to the full possible range of punishment for that offense. *See* TEX. FAM. CODE § 54.04(d)(3)(A). Thus, the notice of grand-jury approval should be considered a pleading filed by, or on behalf of, the State and prohibited by the stay because it is not a "legal objection to the juvenile court proceedings." TEX. FAM. CODE § 55.32(g).

The Second Court of Appeals never addressed, if the "maximum term provided by law" for the offense is affected by whether the State procures a determinate-sentence finding, the State can accomplish such an act when there is a stay in the proceedings. Is it a violation of the stay for the State to procure, and file, grand-jury approval with the trial court? If so, is the State allowed to violate the

statutory stay if it determines, after thoroughly investigating the case, that a determinate-sentence range of punishment is appropriate? Does the juvenile court have any authority to temporarily "lift" the stay if the State determines that commitment until age nineteen would not be sufficient to protect the public? And, if not, does the State have a defense for not obtaining a determinate-sentence finding if it does not have a reasonable amount of time to do so?

The State presented this defense to the Second Court of Appeals but the Second Court of Appeals refused to address it. *See Ex parte Brown*, 2019 WL 5251133, at *3 n.6. This Court should grant this petition to decide whether the State is entitled to the defense that it was prohibited from obtaining grand-jury approval due to the trial court's stay.

PRAYER FOR RELIEF

The State prays that this Court grant this petition, reverse the court of appeals' judgment, and affirm the trial court's denial of Appellant's petition for writ of habeas corpus.

Respectfully submitted,

SHAREN WILSON
Criminal District Attorney
Tarrant County, Texas

JOSEPH W. SPENCE
Assistant Criminal District Attorney
Chief, Post-Conviction

/s/ Andréa Jacobs
ANDRÉA JACOBS
Assistant Criminal District Attorney
Tim Curry Criminal Justice Center
401 W. Belknap
Fort Worth, Texas 76196-0201
(817) 884-1687
FAX (817) 884-1672
State Bar No. 24037596
CCAappellatealerts@TarrantCountytx.gov

CERTIFICATE OF COMPLIANCE

There are 2,880 words in the portions of the document covered by TEX. R. APP. P. 9.4(i)(1).

/s/ Andréa Jacobs
Andréa Jacobs
Asst. Criminal District Attorney

CERTIFICATE OF SERVICE

A copy of the State's Petition for Discretionary Review has been electronically sent to counsel for Appellant, Mr. Sulia Brown, by and through his attorney of record, Mr. Wes Ball, at WBnotices@ballhase.com, 4025 Woodland Park Blvd, Suite 370, Arlington, Texas 76013, and the State Prosecuting Attorney, Ms. Stacey M. Soule, State Prosecuting Attorney, at information@spa.texas.gov, on the 12th day of February, 2020.

/s/ Andréa Jacobs
Andréa Jacobs
Asst. Criminal District Attorney

APPENDIX A
SECOND COURT OF APPEALS' OPINION

In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00064-CR

EX PARTE SULIA LAWRENCE BROWN

On Appeal from Criminal District Court No. 1
Tarrant County, Texas
Trial Court No. 1503867

Before Kerr, Birdwell, and Bassel, JJ.
Opinion by Justice Kerr

OPINION

We decide how long the State may commit Sulia Lawrence Brown, who as a 12-year-old in 2012 was accused of having engaged in "delinquent conduct"[1] (aggravated sexual assault of a child under 14 years old, a first-degree felony) and who filed an application for a habeas corpus writ in June 2018 shortly after turning 19 the previous month, and

- against whom the State did not seek grand-jury approval to assess a determinate sentence,
- whom the juvenile court found "unfit to proceed"[2] about two weeks after the State had filed its petition and whom the juvenile court later ordered committed to a residential-care facility,
- whom the juvenile court transferred to a criminal district court in June 2017 because Brown was about to age out of the juvenile system,
- against whom the State then filed a mere complaint,[3]

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[1]In juvenile court, minors are accused of engaging in either "delinquent conduct" (which includes penal-law violations punishable by imprisonment or by confinement in jail) or "conduct indicating a need for supervision." *See* Tex. Fam. Code Ann. § 51.03(a), (b).

[2]*See* Tex. Fam. Code Ann. § 55.31(a) (using "unfit to proceed" terminology).

[3]The State's choosing a complaint as its charging instrument is perplexing for two reasons.

First, a complaint is a charging instrument that applies (with a few exceptions) only to Class C misdemeanors. Tex. Code Crim. Proc. Ann. arts. 2.05, 12.02(b), 27.14(d), 45.018, 45.019; *see Nam Hoai Le v. State*, 963 S.W.2d 838, 842–43 (Tex. App.—Corpus Christi–Edinburg 1998, pet. ref'd.) (distinguishing a "complaint" as a charging instrument and a "complaint" as a document supporting an information); *Bell v. State*, 734 S.W.2d 83, 84 (Tex. App.—Austin 1987, no pet.) ("Proceedings in

- whom the criminal district court found incompetent in December 2017 and whom the court ordered committed to a residential-care facility, and

- whom the parties do not expect to ever become competent.

While Brown remains incompetent to stand trial, the parties dispute how long he must remain committed in a residential-care facility:

- Brown maintains that the State should have released him on his 19th birthday.

- The State contends that if Brown never becomes competent, he may be committed up to 40 years, until he is 52 years old.

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municipal court are commenced by the filing of a complaint. The prosecutor was not required to file an information in this cause because a complaint suffices as a valid charging instrument in municipal court. The filing of a complaint confers jurisdiction upon the court." (citations omitted.)). The Penal Code does not authorize confinement of any length for a Class C misdemeanor; its punitive limit is a fine not to exceed $500. Tex. Penal Code Ann. § 12.23. Here, between the charging instrument that the State chose and the 40 years for which the State seeks to commit Brown lies an unbridgeable chasm.

Second, no adult charging instrument (an indictment, an information, or a complaint) would appear to have been appropriate because—as we discuss later in the opinion—Brown could not be tried as an adult. *See* Tex. Fam. Code. Ann. § 54.02(a)(2), (h), (j)(2). The State does not explain why its juvenile petition and the juvenile court's transfer order did not suffice to invest the district court with jurisdiction over the cause. *See generally Trejo v. State*, 280 S.W.3d 258, 260 (Tex. Crim. App. 2009) ("Subject-matter jurisdiction depends not only on the grant of authority to the trial court in the Constitution and the statutes, but also on its being invoked for the particular case before the court by the State's pleadings."); *Garcia v. Dial*, 596 S.W.2d 524, 527 (Tex. Crim. App. [Panel Op.] 1980, orig. proceeding) ("Jurisdiction of the subject matter cannot be conferred by agreement; this type of jurisdiction exists by reason of the authority vested in the court by the Constitution and statutes.").

The trial court agreed with the State and denied Brown's application. We reverse the trial court's order and remand the cause to the trial court for further proceedings consistent with this opinion.

I. Standard of Review

Generally, when the trial court denies an application for writ of habeas corpus, we review that denial under an abuse-of-discretion standard. *Ex parte Walsh*, 530 S.W.3d 774, 778 (Tex. App.—Fort Worth 2017, no pet.). But when the decision does not turn on weighing witness credibility or demeanor but turns instead on applying the law to the facts, an abuse-of-discretion standard is not necessarily appropriate. *See Ex parte Martin*, 6 S.W.3d 524, 526 (Tex. Crim. App. 1999); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). When the trial judge is not in an appreciably better position than the reviewing court, we apply a de novo review. *Martin*, 6 S.W.3d at 526. For the same reason, we review legal questions of statutory construction de novo. *See Spence v. State*, 325 S.W.3d 646, 650 (Tex. Crim. App. 2010). If any applicable legal theory supports the trial court's order, we will uphold it. *Walsh*, 530 S.W.3d at 778.

II. The Dispositive Statute

The length of time that the State may confine Brown in a residential-care facility is governed by Article 46B.0095(a) of the Code of Criminal Procedure:

> a defendant may not . . . be committed to a mental hospital or other inpatient or residential facility . . . for a cumulative period that exceeds

> the maximum term provided by law for the offense for which the defendant was to be tried . . . .

Tex. Code Crim. Proc. art. 46B.0095(a).

III. The Adult Sentencing Scheme

Aggravated sexual assault of a child is a first-degree offense. *See* Tex. Penal Code. Ann. § 22.021(a)(1)(B), (a)(2)(B), (e). The "maximum term provided by law" for a first-degree felony is "imprisonment . . . for life or for any term of not more than 99 years." *Id.* § 12.32(a).

But the trial court concluded, correctly, that the life-or-99-years maximum applies only to adults or—as set out in the Family Code—to children whom the juvenile court has certified to stand trial as an adult and who have been transferred to a district court. *See* Tex. Fam. Code Ann. § 54.02(h).

From this, the trial court, the State, and Brown all appear to agree that "the maximum term provided by law" does not alone decide the issue at hand. *See* Tex. Code Crim. Proc. art. 46B.0095(a).

IV. The Juvenile Disposition Scheme

Unlike the adult punishment scheme, the juvenile disposition[4] scheme is not so straightforward.

If certain criteria are met, the juvenile court can waive its jurisdiction and transfer the juvenile to a criminal court to be tried as an adult. *See* Tex. Fam. Code.

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[4]Juveniles have "disposition" hearings, not punishment hearings. *See* Tex. Fam. Code Ann. § 54.04.

Ann. § 54.02(h) ("On transfer of the [juvenile] for criminal proceedings, the [juvenile] shall be dealt with as an adult and in accordance with the Code of Criminal Procedure . . . ."). But because Brown was only 12 when he allegedly engaged in the delinquent conduct, transferring him to the district court to be tried as an adult was never an option, *see id.* § 54.02(a)(2), (j)(2), whether he was fit or unfit to stand trial, competent or incompetent. His age alone kept him from ever being tried as an adult.

For delinquent conduct involving certain offenses—such as the one Brown allegedly committed—that remain in the juvenile court, the State has the option of seeking a determinate sentence, one that has a maximum term of years depending on the offense's severity. *See id.* § 53.045 ("Offenses Eligible for Determinate Sentence"), (a)(5) (listing aggravated sexual assault). In this way, to complete the disposition—to complete the determinate sentence—a juvenile may be held past his 19th birthday, when otherwise the Texas Juvenile Justice Department would "discharge [the juvenile] from its custody" at that time. *See* Tex. Hum. Res. Code Ann. § 245.151(d).

But to get a determinate sentence for a juvenile, the State must petition the grand jury and obtain its approval. *See* Tex. Fam. Code Ann. § 53.045(a), (d). If the grand jury approves a determinate sentence, the maximum disposition that a juvenile can receive for a first-degree felony such as aggravated sexual assault of a child under 14 years old is 40 years. *See id.* § 54.04(d)(3)(A)(ii). In a determinate-sentence situation, a juvenile is initially committed to the Texas Juvenile Justice Department with a possible transfer to the Texas Department of Criminal Justice. *Id.* § 54.04(d)(3).

Additionally, assuming grand-jury approval of a determinate sentence, the State's juvenile petition is deemed an indictment when the juvenile is later transferred to the adult penitentiary. *Id.* § 53.045(d);[5] *see id.* § 54.11(a), (i)(2) (transferring juvenile from TJJD to TDCJ to complete determinate sentence); Tex. Hum. Res. Code Ann. § 245.151(e) (addressing transferring determinate-sentence person to TDCJ on the person's 19th birthday).

But as noted, if the State does not get grand-jury approval for a determinate sentence, the maximum disposition that a juvenile can receive in the juvenile court extends only to his 19th birthday. *See* Tex. Hum. Res. Code Ann. § 245.151(d).

V. Discussion

In the district court, the State argued that extenuating circumstances prevented it from seeking a determinate sentence.

For example, the State argued that because a determinate sentence has serious consequences for a juvenile, it needed time to investigate before deciding to go that route. The State did not want to be put in the position where it must "force a determinate sentence on every child." The prosecutor explained:

> Just for background information, with regard to a determinate sentence approval, typically, the State does not—is not in a position to seek a determinate sentence until the case is further along procedurally. A determinate sentence decision is not based solely on the offense, but it's

[5]"For the purpose of the transfer of a child to the Texas Department of Criminal Justice . . . , a juvenile court petition approved by a grand jury under this section is an indictment presented by the grand jury." Tex. Fam. Code Ann. § 53.045(d).

> based on the background of the child, the child's history, his or her mental health, his or her educational background. All of those things factor in to the decision to seek a determinate sentence.

The State maintained that it had insufficient time to investigate and to decide during the roughly two-week period before the juvenile court found Brown unfit to proceed, and the State argued that once that finding was in place, the juvenile court's resulting stay prevented the State from seeking grand-jury approval.[6] *See* Tex. Fam. Code Ann. §§ 55.31(c), 55.32(f)(1).

Ultimately, the district court ruled that the "'maximum term provided by law' for the offense [for which Brown] was to be tried was [40] years" and thus that Brown could be committed in a residential care facility for up to 40 years.

A. The Parties' Arguments

In a single point, Brown argues that without a grand jury's approving a determinate sentence, any commitment after his 19th birthday is unlawful and is beyond the period that he can be legally detained based on the juvenile-court proceedings.

Throughout the State's brief, it echoed the district court's ruling and contended that 40 years was the maximum term for the offense. And because 40 years was the "maximum term provided by law for the *offense*" (State's emphasis), it dismisses as

[6]The parties dispute the stay's scope and whether the State could have worked around the stay with the juvenile court's permission, but we do not resolve those issues. Whatever the reason, the State did not obtain grand-jury approval.

"irrelevant" the proposition that it had to seek and obtain grand-jury approval before it could hold Brown for 40 years.

We agree with Brown and disagree with the State.

B. No Grand-Jury Approval, No Determinate Sentence

The State argues that forcing it to seek a determinate sentence before it has had a chance to thoroughly investigate the juvenile or the offense is not optimal for either side and that forcing the State to violate a stay to procure a determinate sentence puts it in an untenable position. Although we sympathize with the State's dilemma, we are not persuaded.

The State's desire to investigate a case thoroughly before deciding whether to seek a determinate sentence is premised on its desire to seek justice. *See* Tex. Code Crim. Proc. Ann. art. 2.01. Investigating before deciding is commendable; not every juvenile who commits a first-degree felony deserves a determinate sentence, whatever the length. The stay's purpose is presumably also to seek justice, by halting proceedings that may hurt the juvenile during the time he is unfit to proceed.

But the State then extrapolates that Article 46B.0095(a) authorizes committing Brown for up to 40 years because 40 years was the maximum possible determinate sentence, despite the State's not having gotten the grand jury's requisite approval for it.[7] *See Bleys v. State*, 319 S.W.3d 857, 862–63 (Tex. App.—San Antonio 2010), *overruled*

[7]At trial, the prosecutor affirmed that grand juries decide the juvenile court's jurisdictional punishment scope:

on other grounds by Moon v. State, 451 S.W.3d 28, 47 (Tex. Crim. App. 2014);[8] *In re S.D.W.*, 811 S.W.2d 739, 744 (Tex. App.—Houston [1st Dist.] 1991, no writ). To accept the State's argument, we must pretend that something happened when it did not and additionally pretend that the district court had the jurisdiction to assess a 40-year determinate sentence when it did not. *See Bleys*, 319 S.W.3d at 862–63; *S.D.W.*, 811 S.W.2d at 744.

C. Determinate-Sentence-Eligible Cases, Grand-Jury-Approved Cases, and Section 55.44 Transfer Orders

At the habeas hearing, the State argued that Brown's case was necessarily a determinate-sentence case because only determinate-sentence cases can be properly transferred from the juvenile court to the district court under Section 55.44 of the Family Code, the provision the juvenile court relied on when transferring Brown's

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> The grand—the grand jury, when—when a juvenile case has been filed and is then taken before a grand jury, the grand jury makes a couple of findings; and one, they—if it is presented to them, they will find whether or not there's probable cause that the offense was committed; and number two, whether or not the grand jury believes that the juvenile should be subject to the indeterminate range of punishment, which is up until the 19th birth date or the determinate range of punishment which is zero to 40 for aggravated sexual assault of a child. And so they are making the jurisdictional—they're making the determination of what that punishment range is.

[8]*Moon* cites *Bleys* for the proposition that appellate courts apply a sufficiency review to both the trial court's factual findings under section 54.02(f) and the trial court's ultimate decision to transfer under section 54.02(a). *Moon*, 451 S.W.3d at 43–44 nn.60 & 62. *Moon* applied a sufficiency review to the factual findings but an abuse-of-discretion review to the trial court's ultimate transfer decision. *Id.* at 47.

case. *See* Tex. Fam. Code Ann. § 55.44.[9] We agree that Brown's case was *eligible* for a determinate sentence, but the act of transferring his case to the district court does not transmute it into one in which a determinate sentence was actually authorized.

Moreover, Section 55.44 does not limit transfers to district court of only those juveniles who have been grand-jury-approved to face determinate sentences. Rather,

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[9]Section 55.44 addresses transferring children whom the juvenile court has referred to inpatient mental-health services or to a residential-care facility:

> (a) The juvenile court shall transfer all pending proceedings from the juvenile court to a criminal court on the 18th birthday of a child for whom the juvenile court or a court to which the child's case is referred has ordered inpatient mental health services or residential care for persons with an intellectual disability if:
>
> > (1) the child is not discharged or currently on furlough from the facility before reaching 18 years of age; and
> >
> > (2) the child is alleged to have engaged in delinquent conduct that included a violation of a penal law listed in Section 53.045 and no adjudication concerning the alleged conduct has been made.
>
> (b) The juvenile court shall send notification of the transfer of a child under Subsection (a) to the facility. The criminal court shall, before the 91st day after the date of the transfer, institute proceedings under Chapter 46B, Code of Criminal Procedure. If those or any subsequent proceedings result in a determination that the defendant is competent to stand trial, the defendant may not receive a punishment for the delinquent conduct described by Subsection (a)(2) that results in confinement for a period longer than the maximum period of confinement the defendant could have received if the defendant had been adjudicated for the delinquent conduct while still a child and within the jurisdiction of the juvenile court.

Tex. Fam. Code Ann. § 55.44.

subsection (a)(2) authorizes a transfer of a juvenile who was "alleged to have engaged in delinquent conduct that included a violation of a penal law listed in Section 53.045," as Brown was, and as to whom "no adjudication concerning the alleged conduct has been made." *Id.* § 55.44(a)(2). On its face, this section does not allude to or cross-reference the grand-jury-approval process that Section 53.045 of the Family Code requires for imposing a determinate sentence.

It is only a grand jury's certificate stating that it has approved a determinate sentence that triggers the juvenile court's jurisdiction to impose one. *See Bleys*, 319 S.W.3d at 862–63; *S.D.W.*, 811 S.W.2d at 744. Section 55.44(a)(2) requires only that the alleged delinquent conduct fall within those offenses identified on the determinate-sentence list. By its terms, that section does not expressly limit juvenile transfers to only those juveniles who have been grand-jury-approved to face a determinate sentence. *See* Tex. Fam. Code Ann. § 55.44(a)(2). In short, Section 55.44 authorized Brown's transfer, but nothing in the statute's plain language short-circuits the grand-jury approval that was required to impose a determinate sentence on him.

D. Results Not Absurd

The State argued in the district court and at oral argument that construing the relevant statutes as Brown argues would lead to absurd results and thus would violate one of the statutory-construction canons. *See Tapps v. State*, 294 S.W.3d 175, 177 (Tex. Crim. App. 2009). We are not persuaded that the results are absurd, particularly

because our agreeing with Brown does not mean that he will be released from any confinement after the habeas hearing. Both Brown and the State acknowledged that once he has served the "maximum term provided by law for the offense for which the defendant was to be tried"—whether that be until his 19th birthday (as we conclude) or after 40 years (as the State argued)—extending Brown's confinement could then proceed as a civil-commitment matter. *See* Tex. Code Crim. Proc. art 46B.0095(a) ("maximum term" language), 46B.0095(b).[10] Our holding today does no more than accelerate the timetable for civil-commitment proceedings.

Further, the fact that the various statutes we have discussed do not work perfectly together in such an unusual situation as Brown's does not lead to a nonsensical result. Indeed, the logical leap needed to treat a determinate-sentence-eligible case as a de facto determinate-sentence case strikes us as more absurd.

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[10]The latter section addresses what happens when the "maximum term" expires:

> (b) On expiration of the maximum restoration period under Subsection (a), the mental hospital, facility, or program provider identified in the most recent order of commitment or order of outpatient competency restoration or treatment program participation under this chapter shall assess the defendant to determine if civil proceedings under Subtitle C or D, Title 7, Health and Safety Code, are appropriate. The defendant may be confined for an additional period in a mental hospital or other facility or may be ordered to participate for an additional period in an outpatient treatment program, as appropriate, only pursuant to civil proceedings conducted under Subtitle C or D, Title 7, Health and Safety Code, by a court with probate jurisdiction.

Tex. Code Crim. Proc. Ann. art. 46B.0095(b).

E. *Ex parte Reinke*

Brown, the State, and the trial court all cited *Ex parte Reinke*, 370 S.W.3d 387 (Tex. Crim. App. 2012). *Reinke* addressed whether two prior convictions that the State intended to use to enhance the defendant's punishment from 20 years to 99 years or life were to be considered when determining "the maximum term provided by law for the offense for which the defendant was to be tried." *Id.* at 387–88. The answer was no. *See id.* at 389. The court of criminal appeals explained why:

> We hold that the court of appeals correctly determined that the offense "to be tried" is the second-degree offense of attempted murder, which carries a maximum term of twenty years. . . . The legislature clearly knows the difference between enhancing the level of an offense and enhancing the level of punishment. . . . We hold that, for the purpose of competence to be tried, unless the legislature explicitly states that an enhancement increases not only the punishment range but also the level of the charged offense, the level of the offense alleged in the indictment is not altered by the allegation of prior offenses as enhancements.

Id. (citations omitted).

Because we are not dealing with prior convictions to enhance either Brown's punishment range or his offense level, *Reinke* is distinguishable procedurally. Despite that, *Reinke* is consistent conceptually because it rejects potential punishments as the standard and focuses on the actual punishment that the defendant could receive for the offense charged—and nothing more. *Id.* Here, unless and until the grand jury approved a determinate sentence, a 40-year sentence was only a potential punishment. *See Bleys*, 319 S.W.3d at 862–63; *S.D.W.*, 811 S.W.2d at 744. And here, if—as happened—a grand jury never approved a determinate sentence and Brown was tried

for the delinquent conduct alleged in the State's juvenile petition, the maximum disposition that Brown faced ended on his 19th birthday. *See* Tex. Hum. Res. Code Ann. § 245.151(d). The juvenile petition, standing alone, authorized nothing more. *See Bleys*, 319 S.W.3d at 862–63; *S.D.W.*, 811 S.W.2d at 744.

F. Holding

Because the State never obtained grand-jury approval, neither the juvenile court nor the district court had jurisdiction to impose a determinate sentence. *See Bleys*, 319 S.W.3d at 862–63; *S.D.W.*, 811 S.W.2d at 744. For the same reason that Brown was not subject to the adult punishment scheme, he was not subject to the determinate-sentence scheme—neither one applied to him.

If Brown ever becomes competent to stand trial, he "may not receive a punishment for the delinquent conduct . . . that results in confinement for a period longer than the maximum period of confinement [that he] could have received if [he] had been adjudicated for the delinquent conduct while still a child and within the jurisdiction of the juvenile court." *See* Tex. Fam. Code Ann. § 55.44(b). On this record, we hold that "the maximum term provided by law for the offense for which [Brown] was to be tried," assuming the juvenile court had adjudicated Brown delinquent while he was still a child, was until his 19th birthday. *See* Tex. Code Crim. Proc. art. 46B.0095(a); Tex. Fam. Code Ann. § 55.44(b); Tex. Hum. Res. Code Ann. § 245.151(d). Thus, the trial court erred. *See Spence*, 325 S.W.3d at 650; *Martin*, 6 S.W.3d at 526.

We sustain Brown's point.

VI. Conclusion

Having sustained Brown's point, we reverse the district court's order denying Brown's application and remand the cause to the district court for further proceedings consistent with this opinion. *See Reinke v. State*, 348 S.W.3d 373, 381 (Tex. App.—Austin 2011), *aff'd*, 370 S.W.3d 387 (Tex. Crim. App. 2012).

/s/ Elizabeth Kerr
Elizabeth Kerr
Justice

Publish

Delivered: October 17, 2019

APPENDIX B
SECOND COURT OF APPEALS'
ORDER DENYING
STATE'S MOTION FOR REHEARING

In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00064-CR

EX PARTE SULIA LAWRENCE BROWN

On Appeal from Criminal District Court No. 1
Tarrant County, Texas
Trial Court No. 1503867

ORDER

We have considered the "State's Motion for Rehearing."

It is the opinion of the court that the motion for rehearing should be and is hereby denied and that the opinion and judgment of October 17, 2019 stand unchanged.

We direct the clerk of this court to send a notice of this order to the attorneys of record.

Signed December 12, 2019.

/s/ Elizabeth Kerr
Elizabeth Kerr
Justice

Panel: Kerr, Birdwell, and Bassel, JJ.

APPENDIX C
SECOND COURT OF APPEALS'
ORDER DENYING
STATE'S MOTION FOR EN BANC RECONSIDERATION

In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00064-CR

EX PARTE SULIA LAWRENCE BROWN

On Appeal from Criminal District Court No. 1
Tarrant County, Texas
Trial Court No. 1503867

ORDER

We have considered the "State's Motion for En Banc Reconsideration."

It is the opinion of the court that the motion for en banc reconsideration should be and is hereby denied and that the opinion and judgment of October 17, 2019 stand unchanged.

We direct the clerk of this court to send a notice of this order to the attorneys of record.

Signed December 12, 2019.

/s/ Elizabeth Kerr
Elizabeth Kerr
Justice

En Banc